No. 90-5393-CFH
Status: DECIDED

Title: Jose M. Lozada, Petitioner
v.
George Deeds, Warden

Docketed:
August 3, 1990

Court: United States Court of Appeals
for the Ninth Circuit

Counsel for petitioner: Lozada,Jose M.

Counsel for respondent: Sarnowski,David F.

Entry	Date	Note	Proceedings and Orders
1	Aug 3 1990	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Sep 6 1990		DISTRIBUTED. September 24, 1990
4	Sep 10 1990	P	Response requested -- JPS. (Due October 10, 1990)
6	Oct 9 1990		Order extending time to file response to petition until November 9, 1990.
7	Nov 23 1990		Brief of respondent Deeds in opposition filed.
8	Nov 29 1990		REDISTRIBUTED. January 4, 1991
10	Jan 7 1991		REDISTRIBUTED. January 11, 1991
12	Jan 14 1991		REDISTRIBUTED. January 18, 1991
14	Feb 1 1991		REDISTRIBUTED. February 15, 1991
16	Feb 19 1991		Petition GRANTED. Judgment REVERSED and case REMANDED The Chief Justice and Justice O'Connor would deny certiorari. Opinion per curiam.

****

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

ORIGINAL

No. 90-5393

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER Term, 1989

JOSE M. LOZADA,

Petitioner,

vs.

GEORGE DEEDS, Warden, et al,

Respondent.

PETITIONER FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RECEIVED
1990
U.S.

PETITION FOR WRIT OF CERTIORARI

Jose M. Lozada
So Desert Co.r'l Ctr.
P.O. Box 208
Indian Springs, Nevada 89070

No. _____

IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA

OCTOBER Term, 1990

JOSE M. LOZADA,

Petitioner,

vs.

GEORGE DEEDS, Warden, et al,

Respondents.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The petitioner, Jose M. Lozada, asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed in forma pauperis. Petitioner has previously been granted leave to so proceed in the United States District Court, District of Nevada and the District Court, Clark County, Nevada, both have authorized pauper status in this case. Petitioner's affidavit in support of this motion and exhibits are attached hereto.

DATED this 23 day of July, 1990.

Respectfully submitted,

/s/ Jose M. Lozada

Jose M. Lozada
Petitioner In Pro-Per
P.O. Box 208
Indian Springs, NV. 89070

AFFIDAVIT IN SUPPORT OF A MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, **Jose M. Lozada**, being first duly sworn, depose and say that I am the petitioner in the above-entitled case, that in support of my Motion for Leave to Proceed In Forma Pauperis, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

1. Are you presently employed? Yes___ No. X
   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

   ---

   b. If the answer is no, state the date of your last employment and amount of the salary or wages per month which you received.
   November 11, 1986, $1,000.00 per month.

2. Have you received within the past twelve months any income from a business, profession, or other form of self-employment, or in the form of rent payments, interest, dividends or other sources?
   Yes___ No. X
   a. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

   ---

3. Do you own any cash or checking or savings account?
   Yes___ No. X
   a. If the answer is yes, state the total value of the items owned.

   ---

4. Do you own any real estate, stock, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes___ No X
   a. If the answer is yes, describe the property and state its approximate value.

   ---

5. List the persons who are dependent upon you for support and state your relationship to those persons.
   None

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

/s/ Jose M. Lozada

Subscribed and sworn to before me this 23 day of July, 1990

Notary Public, State of Texas
COUNTY OF [illegible]
JAMES B. PATTERSON
My Appointment Expires
Nov 14 1991

James B. Patterson
Notary

My Commission expires:

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER Term, 1989

No._____

JOSE M. LOZADA,

Petitioner,

v.

GEORGE DEEDS, Warden, et al,

Respondent.

PROOF OF SERVICE

I, **Jose M. Lozada**, do swear or declare that on this date, _____, 1990, pursuant to Supreme Court Rules 29.3 and 29.4, I have served the attached **MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS** and **PETITION FOR A WRIT OF CERTIORARI** on each party to the above proceeding, or that party's counsel, and on every other person required to be served by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

BRIAN McKAY, Attorney General
C/O Robert J. Gower, Deputy Attorney General
Criminal Justice Division
State Mailroom Complex
Las Vegas, Nevada 89158

Jose M. Lozada
Affiant

Subscribed and Sworn to Before Me
this 23 day of July, 1990.

Notary Public-State Of Nevada
COUNTY OF CLARK
JAMES P. PATTERSON
My Appointment Expires
Nov 12 1991

Notary Public in and for said
County and State.

RECEIVED
RECEIVED
JAN 1 3 19
CLERK U.S. DISTRICT COURT
DISTRICT OF NEVADA
BY
RECEIVED
AND FILED
MAR 8 5 AM '89
BY DEPUTY

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

JOSE M. LOZADA,

Petitioner,

vs.

GEORGE DEEDS, Warden of S.D.C.C.,

BRIAN McKAY, A.G. of Nev.,

Respondent.

CV-S-89-173 LDG (LRL)

CASE NO. (To be supplied by the Clerk)

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND SUPPORTING DECLARATION

(Pursuant to 28 U.S.C. §1915 and 28 U.S.C. §1746)

I hereby apply for leave to: (check one)

/XX/ Commence this action for habeas corpus/civil rights relief

/ / Pursue this action under 28 U.S.C. §2255 or Fed.R.Crim.P. 35

without prepayment of fees and costs or giving security therefor.

In support of my application, I state that the following facts are true:

1) I am the party initiating said action and I believe that I am entitled to relief.

2) The nature of this action is: Petition for Writ of HABEAS CORPUS pursuant to 28 U.S.C., Section 2254.

3) I am unable to prepay the costs of this action or give security therefor because of my poverty.

Exhibit "1"

4) I have no assets or funds which could be used to prepay the fees or costs, except: NONE ~~N/A~~

Inmate: Nevada Prison System ~~N/A~~

(Write "none" above if you have nothing; otherwise list your assets.)

5) During the preceding twelve months, I have received income (Wages, gifts or other payments) from the following sources:

NONE N/A

N/A

N/A

(List both amount and source.)

6) You may state briefly any additional financial or other information regarding your ability to pay the costs of this action (for example, persons who are dependent on you for support): NONE N/A

Inmate - S.D.C.C. N/A

Inmate: Nevada Prison System - No Money N/A

I understand that a false statement or answer to any question in this declaration will subject me to penalties of perjury.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE UNITED STATES OF AMERICA THAT THE FOREGOING IS TRUE AND CORRECT. 28 U.S.C. §1746 and 18 U.S.C. §1621.

Executed at S.D.C.C., Indian Spg., NV (Location) on January 19 - 04 ~~December, 19~~ (Date)

Jose M. Losada
(Signature)

JOSE M. LOSADA

#23574
(Inmate's Prison Number)

I request that an authorized officer of the penal institution in which I am incarcerated complete the Certificate below regarding funds on deposit in my account at said institution.

Jose M. Lozada
(Signature)

Jose M. Lozada
(Name Printed)

23574
(Inmate's Prison Number)

- - - - - - - - - - -

CERTIFICATE

I hereby certify that on December 16, 1988 the movant herein had cash and securities in the amount of $ 63.76 on account to his/her credit at the penal institution where (s)he is confined.

(Please sign in ink in a color other than black.)

J Dunn
Authorized Officer of Penal Institution

12-16-88
(Date)

Asst Clk
(Title)

* * * * * * * * * * *

ORDER

In reliance upon the representations and information set forth in the above motion, declaration and certificate, IT IS ORDERED THAT

☑ The motion for leave to proceed in forma pauperis is granted, and the Clerk of the Court is directed to file the complaint. The movant herein is permitted to maintain this action to conclusion without the necessity of prepayment of fees or costs or the giving of security therefor.

☐ This order granting in forma pauperis status shall not extend to the issuance of subpoenas at government expense.

☐ The Clerk of the Court is directed to issue summons to defendant(s) herein and deliver the same to the United States Marshal for service.

☐ The plaintiff shall have twenty (20) days within which time to furnish to the United States Marshal the required forms USM 285.

☐ Plaintiff shall serve upon defendant(s) or, if appearance has been entered by counsel, upon the attorney(s), a copy of every further pleading, motion or other document submitted for consideration by the court. The plaintiff shall include with the original paper to be filed with the Clerk of the Court a certificate which states the date that a true and correct copy of any document was mailed to the defendant(s) or counsel for the defendant(s). Any paper received by a district judge or magistrate which has not been filed with the Clerk of the Court or which fails to include a certificate of service will be disregarded by the court.

☐ The Clerk of the Court shall file the petition for a writ of habeas corpus and shall serve respondent(s) by certified mail but the respondent(s) shall not have to answer said petition unless the court subsequently orders otherwise.

☐ This motion for leave to proceed ~~in forma~~ pauperis is denied.

Dated: 3 March 1989

UNITED STATES DISTRICT JUDGE/
UNITED STATES MAGISTRATE

FILED

District Court

CLARK COUNTY, NEVADA

JUN 2' 8 07 AM '88

Scott Lemon
CLERK

JOSE M. LOZADA,

Petitioner,

-VS-

THE STATE OF NEVADA,

Respondent.

Case No. C75275
Dept. No. III
Docket No. _____

ORDER FOR PERMISSION TO PROCEED IN FORMA PAUPERIS

This matter having come before the Court and good cause appearing that the Petitioner herein has met the burden of responsibility in the matter of application for this ORDER, through the Motion for Permission to Proceed In Forma Pauperis, and showing due cause by and through the Affidavit as required by law, the Petitioner, herein is found to be justly qualified and competent to proceed without paying of fees or the costs of prosecuting this action, or the providing of securities thereof. Therefore it is:

ORDERED that the Petitioner herein be given Leave to Proceed in Forma Pauperis in the above-entitled matter before this Court.

DATED: June 16, 1988.

JOSEPH S. PAVLIKOWSKI

JUDGE OF THE DISTRIC COURT

Jose M. Lozada

Jose M. Lozada #23574
Petitioner In Pro-Per
P.O. BOX 208-SDCC
Indian Springs, Nevada 89070

Exhibit "2"

DCC law library

ORIGINAL

No. 90-5393

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER Term, 1989

JOSE M. LOZADA,

Petitioner,

vs.

GEORGE DEEDS, Warden, et al,

Respondent.

PETITIONER FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

RECEIVED
AUG 03 1990
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Jose M. Lozada
So Desert Corr'l Ctr.
P.O. Box 208
Indian Springs, Nevada 89070

QUESTION FOR REVIEW

Whether Petitioner was denied effective assistance of counsel at a critical stage in the proceeding leading to his incarceration, because he was never apprised of his rights to an appeal and to counsel on appeal, and did he voluntarily, understandingly and intelligently acquiesced in his failure to take an appeal, and did the court error by not holding an evidentiary hearing on the merits.

TABLE OF CONTENTS

	PAGE NO.
QUESTION FOR REVIEW	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS IN THE CASE	2
JURISDICTIONAL STATEMENTS	2
PROVISIONS INVOKED	3
STATEMENT OF THE CASE	3-5
ARGUMENT	5-7
CERTIFICATE OF MAILING	7

TABLE OF AUTHORITIES

CASES CITED:	PAGE NO.
Daniels v. Alabama, 487 F.2d 887 (1973)	6
Douglas v. California, 372 U.S. 353 (1963)	5
Fay v. Noia, 372 U.S. 319 (1963)	5
Gairson v. Cupp, 415 F.2d 352 (1969)	6
Goodwin v. Cardwell, 432 F.2d 521 (1970)	6
Heike v. United States, 217 U.S. 423 (1910)	5
Jackson v. Turner, 442 F.2d 1303 (1971)	6
Johnson v. Zerbst, 304 U.S. 458 (1938)	5
Lane v. Brown, 372 U.S. 477 (1963)	7
Nelson v. Peyton, 416 F.2d 1154 (1969)	6
Penson v. Ohio, 109 S.Ct. 346 (1988)	7
Riser v. Craven, 501 F.2d 381 (1975)	7
Rodriguez v. United States, 395 U.S. 327 (1969)	7
Swenson v. Bosler, 386 U.S. 258 (1967)	6
Townsend v. Sain, 372 U.S. 293 (1963)	7
United States ex rel. Singleton v. Woods, 440 F.2d 835	6
United States ex rel. Smith v. McMann,417 F.2d 648 (1971)	6
United States ex rel. Williams v. LaVallee, 487 F.2d 1006	6
Willey v. Coiner, 464 F.2d 525 (1972)	6
CONSTITUTION CITED:	
Sixth Amendment	
Fifth and Fourteenth Amendments	
Nevada, Article 1, Section 8	
STATUTE CITED:	
Title 28 U.S.C. Section 2254(d)	
Nevada Rules of Appellate Procedures	
Nevada Revised States	

OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS IN THE CASE

JOSE M. LOZADA v. GEORGE DEEDS, 9th Cir. 1990, Case No.90-15612.

JOSE M. LOZADA v. GEORGE DEEDS, Dist. Ct. Nev. 1988, Case No. CV 89-173-LDG.

JOSE M. LOZADA v. THE STATE OF NEVADA, Nev. Sup. Ct. 1988, Case No.19333.

JOSE M. LOZADA v. STATE OF NEVADA, Dist. Ct., Clark County, Nev. 1988, Case No.C75275.

JURISDICTIONAL STATEMENTS

Jurisdiction of this Court is invoked due to the following:

1. On **May 30, 1990**, the United States Court of Appeal for the Ninth Circuit denied Petitioner's request for a certificate of probable cause;

2. On **April 3, 1990**, the United States District Court for the District of Nevada denied Petitioner's certificate of probable cause;

3. On **March 13, 1990**, the United States District Judge, Lloyd D. George, denied Petitioner's Writ of Habeas Corpuspursuant to 28 U.S.C. Section 2254, by a Person in State Custody;

5. On **October 21, 1988**, the Supreme of Court of Nevada Order dismissing appeal of appellant's petition for post-conviction relief;

6. On **July 18, 1988**, the District Court, Clark County, Nevada denied Petitioner's Petition for Post-Conviction Relief; and

7. Pursuant to Rule 10 of the Rules of this Court.

/ / / / / / / / / /

/ / / / / / / / / /

PROVISIONS INVOKED

1. The Constitution of the United States, Sixth Amendment, and Fifth and Fourteenth Amendments.

2. The Constitution of the State of Nevada, Article 1, Section 8;

3. Title 28 U.S.C. Section 2254(d);

4. Nevada Rules of Appellate Procedures; and

5. Nevada Revised Statues.

STATEMENT OF THE CASE

In **March 1986**, the Petitioner retained James Buchanan, Esquire for $3,000.00 dollars as defense counsel for a jury trial. On **November 5, 1986**, the juror returned a verdict of guity. Then on **December 16, 1986**, Petitioner was sentenced without defense counsel informing the trial court of his financial statute and desire to appeal. The trial court did not made an inquiry or informed him of his right to an appeal and to counsel no appeal. Petitioner also had a court-appointed interpreter throughout his jury trial and at sentencing. (See Exhibit "3")

On **June 16, 1988**, District Court, Clark County, Nevada held a hearing on Defendant's Proper Person Motion to Proceed in Forma Pauperis, Defendant's Proper Person Motion to Appoint Counsel, and Defendant's Proper Person Writ, Petitioner not present represented by James Buchanan, who was allowed to withdraw as counsel. Matter continued for Argument. (See Exhibit "3")

On **July 7, 1988**, District Court, Clark County, Nevada held a hearing for an argument on writ, Petitioner appearing in Proper Person with a court-appointed interpreter, and the Court summarily denied Petitioner's Writ of Habeas Corpus. (See Exhibit "3")

On **September 6, 1988**, Petitioner was "notified" that the Clerk of the Nevada Supreme Court has this day received the following: Record on Appeal, Vol. I (copy). (See Exhibit "4") Petitioner was never forward a copy of said Record on Appeal.

On **October 21, 1988**, the Supreme Court of Nevada dismissed his appeal stated: "(I)n the present case, appellant claimed claimed below that his counsel was ineffective because he failed to inform appellant that he had the right to appointed counsel in a direct appeal and because counsel falsely informed him that he had given appellant's case file to the public defender to prosecute appellant's direct appeal. Appellant neglected, however, to set forth any issues that could have been raised in a direct appeal, and further failed to allege or demonstrate that such an appeal would have been successful. Therefore, appellant failed to demonstrate that the alleged deficiencies of his counsel prejudiced him in any way." (See Exhibit "5")

On **March 13, 1990**, the United States District Court, District of Nevada denied Petitioner's Writ of Habeas Corpus pursuant to 28 U.S.C. Section 2254 without an evidentiary hearing being held, and stated: "(C)ounsel's failure to inform Lozada of his right to appeal could very well have fallen below constitutional standards. However, the court need not decide that issue.. . . . . Consequently, he has not shown any prejudice flowing from counsel's failure to advise him of his right to appeal.. . . . . IT IS ORDERED THAT the United States Magistrate's Report and Recommendations (#9) be adopted." (See Exhibit "6")

. . .

. . .

On **April 3, 1990,** the United States District Court, District of Nevada, denied Petitioner's certificate of probable cause, and stated: "After reviewing the record in this case, the court determines that Lozada's appeal fails to raise a substantial question for review by the Circuit Court of Appeals. Lozada simply has not shown that he suffered any prejudice even if his attorney's conduct fell below constitutional standard. Thus, any appeal would be friviolous." (See Exhibit "7")

On **May 30, 1990,** the United States Court of Appeal for the Ninth Circuit denied Petitioner's request for a certificate of probable cause. (See Exhibit "8")

ARGUMENT

A close examination of this case will substantiate that there was no consideration given directly to the issue of whether Petitioner was informed in the first instance of a right to appeal, nor does it appear with clarity whether in fact the Petitioner in this case had been aware of his right to appeal. "(W)here the right to appeal a criminal conviction exists, it exists only by statute." See **Heike v. United States**, 217 U.S. 423, 30 S.Ct. 539, 54 L.Ed. 821 (1910). Under federal standards, one may not relinquish intentionally an unknown right. **Johnson v. Zerbst**, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938); **Fay v. Noia**, 372 U.S. 319, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963).

In the instant case the determinative, basic question is whether Petitioner knew that he had a right to appeal. An indigent has a right to be advised that he is entitled to court-appointed counsel on appeal. **Douglas v. California**, 372 U.S. 353, 83 S.Ct. . . .

814, 9 L.Ed.2d 811 (1963); **Swenson v. Bosler**, 386 U.S. 258, 87 S.Ct. 996, 18 L.Ed.2d 33 (1967). In addition, a defendant, whether indigent or not, also has the right to be properly advised of his right to appeal. **Nelson v. Peyton**, 416 F.2d 1154 (4th Cir.1969), cert denied, 397 U.S. 1007, 90 S.Ct. 1235, 25 L.Ed.2d 420 (1970); **Willey v. Coiner**, 464 F.2d 525 (4th Cir.1972); **Daniels v. Alabama**, 487 F.2d 887, 888 (5th Cir.1973); **United States ex rel. Williams v. LaVallee**, 487 F.2d 1006 (2nd Cir.1973), cert denied, 416 U.S. 916, 94 S.Ct. 1622, 40 L.Ed.2d 118 (1974). The communication to the defendant his right to appeal is generally made by defense counsel or the court, which will satisfy federal standards. See **Jackson v. Turner**, 442 F.2d 1303, 1307 (10th Cir.1971); **United States ex rel. Singleton v. Woods**, 440 F.2d 835, 836 (7th Cir.1971); **United States ex rel. Smith v. McMann**, 417 F.2d 648, 654 (2nd Cir.1969), cert denied, 397 U.S. 925, 90 S.Ct. 929, 25 L.Ed.2d 105 (1970); **Goodwin v. Cardwell**, 432 F.2d 521 (6th Cir.1970).

Petitioner did not know of his right to appeal, and the absence of such knowledge is a clear indication that the was denied the effective assistance of counsel. **Compare** the case at bar with **Gairson v. Cupp**, 415 F.2d 352 (9th Cir.1969). This follows because he did have a right to appeal, and it was the duty of his counsel to advise him of the right and how and when to exercise it. In **Rodriguez v. United States**, 395 U.S. 327, 89 S.Ct. 1715, 23 L.Ed.2d 340 (1969), rejected the requirement of showing of some likelihood of success on appeal as a condition precedent to habeas corpus relief. In addition, there was no evidentiary hearing held under the unusual circumstances of this case in accordance to the . . .

teaching of **Townsend v. Sain**, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963), where all of the facts should have been further developed.

Petitioner implies that he was not provided effective assistance of counsel with respect to a critical stage in the proceeding leading to his incarceration so that, in accordance with current constitutional doctrine, he should be entitled to relief. See **Penson v. Ohio**, ___ U.S. ___, 109 S.Ct. 346 (1988), is the determinative basis for the protection of his appeallate rights.

The appropriate relief is indicated by the Supreme Court's disposition of **Lane v. Brown**, 372 U.S. 477, 485, 83 S.Ct. 768, 773 (1963). See also **Riser v. Craven**, 501 F.2d 381 (9th Cir.1975).

DATED this 29 day of June, 1990.

Respectfully submitted,

Jose M. Lozada
Petitioner In Pro-Pre

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the above and foregoing Motion for Leave to Proceed In Forma Pauperis were mailed on 29 day of June, 1990, addressed to:

BRAIN McKAY, Attoney General
C/O Robert J. Gower, DAG
Criminal Justice Division
State Mailroom Complex
Las Vegas, Nevada 89158

Jose M. Lozada
So Desert Corr'l Ctr.
P.O. Box 208
Indian Springs, Nevada 89070
Petitioner In Pro-Per

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

ORIGINAL

RESPONSE REQUESTED

Supreme Court, U.S.
FILED
NOV 23 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-5393

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

JOSE M. LOZADA, Petitioner,

v.

GEORGE DEEDS, Warden, and
BRIAN McKAY, Attorney General of the State of Nevada,

Respondents

BRIEF OF THE RESPONDENTS IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

BRIAN McKAY
Nevada Attorney General

DAVID F. SARNOWSKI*
Chief Deputy Attorney General
Criminal Justice Division
Heroes' Memorial Building
Capitol Complex
Carson City, Nevada 89710
Telephone (702) 687-4170

ATTORNEYS FOR RESPONDENTS

*Counsel of Record

QUESTIONS PRESENTED

1. Should the Court grant discretionary review of the dismissal of the Petition for Writ of Habeas Corpus when three circuit courts of appeal and Nevada's highest court have rendered conflicting decisions on the issue of whether a petitioner seeking habeas relief must demonstrate prejudice resulting from counsel's alleged failure to effectively assist in pursuing a direct appeal from conviction?

2. Should the Court grant discretionary review of whether the petitioner was entitled to an evidentiary hearing when the lower courts disposed of the Petition for Writ of Habeas Corpus on legal grounds only?

TOPICAL INDEX

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	ii
OPINIONS AND JUDGMENTS DELIVERED BELOW	1
JURISDICTIONAL STATEMENT	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	5
SUMMARY OF THE ARGUMENT	7
ARGUMENT	
1. The Court Should Grant Discretionary Review of the Dismissal of the Petition for Writ of Habeas Corpus Because Three Circuit Courts and Nevada's Highest Court have Rendered Conflicting Decisions on the Issue of Whether a Petitioner Seeking Habeas Relief Must Demonstrate Prejudice Resulting from Counsel's Alleged Failure to Perfect a Direct Appeal.	8
2. The Court Should Not Accept Discretionary Review of Whether the Petitioner was Entitled to an Evidentiary Hearing Because the Lower Court Disposed of the Petition for Writ of Habeas Corpus on Legal Grounds Only.	11
CONCLUSION	12
APPENDIX A	
APPENDIX B	
APPENDIX C	
APPENDIX D	

TABLE OF AUTHORITIES

Cases	Page
Abels v. Kaiser 913 F.2d 821 (10th Cir. 1990)	9
Barker v. Ohio 330 F.2d 594 (6th Cir. 1964)	11
Bell v. Lockhart 795 F.2d 655 (8th Cir. 1986)	9
Doyle v. United States 721 F.2d 1195 (9th Cir. 1983)	9
Evitts v. Lucey 469 U.S. 387 (1985)	8,10
Murray v. Carrier 477 U.S. 478 (1986)	7,8,10
Riser v. Craven 501 F.2d 381 (9th Cir. 1974)	9
Rodriquez v. United States 395 U.S. 327 (1969)	9
Sanders v. Craven 488 F.2d 478 (9th Cir. 1973)	9
Simmons v. Beyer 689 F.Supp. 432 (D.N.J. 1988)	9
Strickland v. Washington 466 U.S. 668 (1984)	6,7,8,9 10,11,12
Townsend v. Sain 372 U.S. 293 (1963)	11
United States v. Popoola 881 F.2d 811 (9th Cir. 1989)	9
Wainwright v. Sykes 433 U.S. 72 (1977)	10
Williams v. Lockhart 849 F.2d 1134 (8th Cir. 1986)	9

Statutory Provisions

18 U.S.C. § 8006A(g)	4
28 U.S.C. § 686(b)	2
28 U.S.C. § 1257(3) (1987)	1
28 U.S.C. § 2254	2,6
Rule 10 United States Supreme Court Rules	5
Nev. Rev. Stat. 177.315	6

OPINIONS AND JUDGMENTS DELIVERED BELOW

This is a Petition for Writ of Certiorari seeking review of an order denying a certificate of probable cause to appeal entered by the United States Court of Appeals for the Ninth Circuit (Ninth Circuit) on May 30, 1990. See Exhibit 8 to Petition for Writ of Certiorari. That order denied relief from the summary decision of the United States District Court for the District of Nevada (federal district court) dismissing the petitioner's Petition for Writ of Habeas Corpus. (Appendix A). See Exhibit 7 to Petition for Writ of Certiorari. The federal district court also declined to issue a certificate of probable cause to appeal.

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked by the subject certiorari petition pursuant to section 1257(3) of Title 28 of the United States Code. 28 U.S.C. Sec. 1257(3) (1982).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Section One of the Fourteenth Amendment to the United States Constitution.

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of law.

2. Fifth Amendment to the United States Constitution.

No person shall be . . . deprived of life, liberty, or property without due process of law.

3. The Sixth Amendment to the United States Constitution.

In criminal prosecutions, the accused shall . . . have the assistance of counsel for his defense.

4. 28 U.S.C. Sec. 2254:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
>
> (b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
>
> (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.
>
> (d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit --
>
> (1) that the merits of the factual dispute were not resolved in the State court hearing;
>
> (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
>
> (3) that the material facts were not adequately developed at the State court hearing;
>
> (4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the

State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record: And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record is the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court,

duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding. (As amended Nov. 2, 1966, Pub.L. 89-711, § 2, 80 Stat. 1105.)

5. Rule 8 of the Rules Governing Section 2254 Cases in the United States District Courts.

(a) Determination by court. If the petition is not dismissed at a previous stage in the proceeding, the judge, after the answer and the transcript and record of state court proceedings are filed, shall, upon a review of those proceedings and of the expanded record, if any, determine whether an evidentiary hearing is required. If it appears that an evidentiary hearing is not required, the judge shall make such disposition of the petition as justice shall require.

(b) Function of the magistrate.

(1) When designated to do so in accordance with 28 U.S.C. § 686(b), a magistrate may conduct hearings, including evidentiary hearings, on the petition, and submit to a judge of the court proposed findings of fact and recommendations for disposition.

(2) The magistrate shall file proposed findings and recommendations with the court and a copy shall forthwith be mailed to all parties.

(3) Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court.

(4) A judge of the court may accept, reject, or modify in whole or in part any findings or recommendations made by the magistrate.

(c) Appointment of counsel; time for hearing. If an evidentiary hearing is required the judge shall appoint counsel for a petitioner who qualifies for the appointment of counsel under 18 U.S.C. § 8006A(g) and the hearing shall be conducted as promptly as practicable, having regard for the need of counsel for both parties for adequate time for investigation and preparation. These rules do not limit the appointment of counsel under 18 U.S.C. § 8006A at any stage of the case if the interest of justice so requires.

6. Rule 10 of the United States Supreme Court Rules:

> 1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> (b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.
>
> (c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

STATEMENT OF THE CASE

Jose Lozada (hereinafter LOZADA) is presently incarcerated in Nevada's Department of Prisons at the Southern Desert Correctional Center. On January 7, 1987, a Clark County, Nevada jury convicted LOZADA of one count each of Conspiracy to Sell Controlled Substance, Sale of Controlled Substance, Trafficking in Controlled Substance, and Possession of Controlled Substance. The court sentenced LOZADA to serve a total of 23 years in the state prison.

LOZADA never took a direct appeal of the conviction. (Appendix D). Instead, on or about January 11, 1988, he filed a Petition for Post-conviction Relief pursuant to Nev. Rev. Stat

177.315 et. seq. (Appendix B) in the Eighth Judicial District Court. The court denied the petition on July 12, 1988. LOZADA appealed the state district court's denial of the petition.

The Nevada Supreme Court dismissed LOZADA's appeal by an unpublished order, dated October 21, 1988. See Order Dismissing Appeal, attached as Exhibit 5 to Petition for Writ of Habeas Corpus. The supreme court noted that LOZADA's sole contention in his post-conviction petition was that his trial counsel was ineffective because he failed to inform LOZADA of his right to appointed counsel on direct appeal and falsely told him that he (the attorney) had referred the case to the county public defender to prosecute the appeal. See Lozada v. State of Nevada, Case No. 19333, Order Dismissing Appeal, pp. 1-2. The state supreme court found that LOZADA neglected to allege any issues which could have been raised on appeal and did not demonstrate that he could succeed. Id., at 2. Relying on Strickland v. Washington, 466 U.S. 668 (1984), the state supreme court concluded that LOZADA did not make the required showing of prejudice to support a claim of ineffective assistance of counsel. Id.

On March 5, 1989, LOZADA filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. sec. 2254 in the federal district court. See Petition, attached hereto as Exhibit A. He alleged that his Sixth Amendment right to effective assistance of counsel was violated when his retained trial counsel failed to advise him of (1) his right to appeal, and (2) the procedures and time limits to appeal. The petition further alleged that LOZADA directed his

sister to meet with his trial counsel to discuss hiring his services. His trial counsel purportedly told LOZADA's sister that he had forwarded his case to the Clark County Public Defender's office since it would be cheaper for LOZADA to have the public agency prosecute the appeal.

By an Order, dated March 13, 1990, the federal district court dismissed the petition without holding an evidentiary hearing. Citing Strickland, supra, and Murray v. Carrier, 477 U.S. 478 (1986). The federal district court ruled that LOZADA was required to show that his attorney's performance was deficient and to show that but for the deficiency, the result would have been different. The federal district court found it unnecessary to decide whether trial counsel's performance was substandard. Instead, the federal district court focused on the second prong of the Strickland test. It found that LOZADA did not identify any issue which he could have successfully raise on appeal. Accordingly, the federal district court dismissed the petition, ruling that LOZADA completely failed to demonstrate any prejudice flowing from the alleged deficiencies of trial counsel. See, Order, Lozada v. Deeds, Case No. CV-S-89-173-LDG(LRL), attached as Exhibit 6 to Petition for Writ of Certiorari. Both the federal district court and the Ninth Circuit declined to issue a certificate of probable cause. See attached Exhibits 7 and 8 to Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

Respondents submit that a grant of writ of certiorari is appropriate because a division of authority exists among three

circuits and the Nevada Supreme Court with respect to whether a petitioner must demonstrate prejudice stemming from the alleged failure of counsel to effectively assist in the filing of the first appeal as of right. Additionally, this case involves important issues left open in Muray v. Carrier, 477 U.S. 478 (1986) and Evitts v. Lucey, 469 U.S. 38887 (1985). Discretionary review of the issue regarding the need for an evidentiary hearing is unwarranted at this juncture since the lower court based its decision solely on legal grounds.

ARGUMENT

1. The Court Should Grant Discretionary Review of the Dismissal of the Petition for Writ of Habeas Corpus Because Three Circuit Courts and Nevada's Highest Court have Rendered Conflicting Decisions on the Issue of Whether a Petitioner Seeking Habeas Relief Must Demonstrate Prejudice Resulting from Counsel's Alleged Failure to Perfect a Direct Appeal.

In this case, the Nevada Supreme Court ruled that LOZADA had not demonstrated prejudice as the result of his attorneys' alleged deficient representation. Inferentially, by denying a certificate of probable cause, the Ninth Circuit agreed.

Three federal circuit courts have reached divergent published results in deciding whether a petitioner seeking habeas relief must demonstrate prejudice resulting from counsel's alleged failure to effectively assist in pursuing an appeal from a conviction. The disagreement focuses on the proper application of Strickland v. Washington, 466 U.S. 688 (1984) and its progeny. More precisely,

the circuits disagree on how, if at all, to apply the Strickland requirement that a petitioner must show prejudice by establishing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694.

Arguably, the Ninth Circuit has ruled that petitioners must satisfy the prejudice requirement of Strickland by raising errors which could have been successfully raised on Appeal. United States v. Popoola, 881 F.2d 811, 813 (9th Cir. 1989). The Popoola decision represents a departure from the Ninth Circuit's decisions prior to Strickland. See Doyle v. United States, 721 F.2d 1195 (9th Cir. 1983); Riser v. Craven, 501 F.2d 381 (9th Cir. 1974); Sanders v. Craven, 488 F.2d 478 (9th Cir. 1973). In contrast to Popoola, the United States Court of Appeals for the Tenth Circuit has ruled that the Strickland requirement of showing prejudice is inapplicable when counsel fails to properly perfect an appeal. Abels v. Kaiser, 913 F.2d 821, 823 (10th Cir. 1990). The Abels court applied the pre-Strickland holding in Rodriguez v. United States, 395 U.S. 327 (1969). The Eighth Circuit has ruled likewise. Williams v. Lockhart, 849 F.2d 1134, 1137 & n.3 (8th Cir. 1986); Bell v. Lockhart, 795 F.2d 655, 657-58 (8th Cir. 1986). See also, Simmons v. Beyer, 689 F.Supp. 432, 445-46 (D.N.J. 1988) (holding failure to file appeal constitutes per se prejudice).

Respondents submit that resolution of the conflict among the circuits and Nevada Supreme Court will require this Court to reconcile Strickland with Rodriquez. As the Eighth Circuit

indicated, whether Strickland overrules Rodriquez is unclear. Estes, 883 F.2d at 649; Bell, 795 F.2d at 657 n.7.

Additionally, this case presents the opportunity to address issues left open in Murray v. Carrier, 477 U.S. 478 (1986). In Murray, the Court applied the "cause and prejudice" rule of Wainwright v. Sykes, 433 U.S. 72 (1977) to a claim that appellate counsel failed to raise a particular issue on appeal which resulted in procedural default on that issue. Murray, 477 U.S. at 483-97. This Court ruled that the petitioner must show cause and prejudice resulting from the procedural default. Id, at 488. This Court left open the issue of whether the cause and prejudice rule should apply to instances where counsel failed to take an appeal. Id. at 492. The instant case involves a procedural default caused by the alleged failure of counsel to assist LOZADA in prosecuting an appeal within 30 days of entry of conviction. See NRAP 4(b). (Appendix D). The federal district court relied upon Murray in holding that LOZADA failed to demonstrate prejudice. See Lozada v. State of Nevada, Case No. 19333, Order Dismissing Appeal, p. 1-2. Accordingly, this case involves the issue left open in Murray.

The instant case also involves an issue left open in Evitts v. Lucey, 469 U.S. 387 (1985). In Evitts, the petitioner's attorney neglected to file a statement of appeal along with his appellate brief and record, which resulted in a dismissal of the appeal. Id. at 389-90. The Evitts Court confirmed that the right of effective assistance of counsel extends to appellate proceedings, but left open the question of appropriate standards for judging claims of

ineffective assistance of counsel. Id. at 392. Although in Evitts this Court ruled that the states cannot dismiss the first right of appeal when counsel fails to follow mandatory appellate procedures, it did so without analysis of the prejudice requirement in Strickland. See Id. at 392-405. Thus, it remains to be seen whether Evitts is limited to its facts or is to be broadly construed by holding that prejudice is presumed when counsel fails to pursue an appeal.

2. The Court Should Not Accept Discretionary Review of Whether the Petitioner was Entitled to an Evidentiary Hearing Because the Lower Court Disposed of the Petition for Writ of Habeas Corpus on Legal Grounds Only.

Respondents submit that the issue of whether the lower court erred in failing to hold an evidentiary hearing does not merit review under Supreme Court Rule 10. The rule clearly specifies that an evidentiary hearing is only required when facts are in dispute. Townsend v. Sain, 372 U.S. 293 (1963); 28 U.S.C. 2254(d); See Rule 8, Rules Governing Section 2254 Cases. An evidentiary hearing is not necessary when purely legal issues are presented. Barker v. Ohio, 330 F.2d 594 (6th Cir. 1964). The federal district court did not need to hold an evidentiary hearing because it rested its decision on legal grounds only, i.e., that LOZADA failed to satisfy the prejudice requirement of Strickland.

Respondents do not concede that this case is free of factual dispute concerning the trial attorney's alleged failure to assist LOZADA in pursuing an appeal. This factual issue, however, was

irrelevant to the rulings of the lower courts. While it may be necessary in the future via a state habeas corpus proceeding (Appendix C) or a federal court evidentiary hearing to resolve the factual issues of (1) whether LOZADA insisted that counsel appeal for him and (2) what steps counsel took to protect LOZADA's interests, resolution of those issues aren't necessary to the disposition of the case as it stands before the court.

CONCLUSION

The Court should issue a writ of certiorari to resolve a conflict among several federal appellate courts and the Nevada Supreme Court as to whether a state prisoner needs to demonstrate prejudice under Strickland v. Washington, 466 U.S. 688 (1984) when contrary to his client's wishes, counsel does not perfect a direct appeal in the state courts. The Court should deny the application for a writ of certiorari as to any other issues.

DATED: November 13, 1990.

Respectfully Submitted,

BRIAN McKAY
Nevada Attorney General

By David F. Sarnowski
David F. Sarnowski
Chief Deputy Attorney General
Criminal Justice Division
Heroes' Memorial Building
Capitol Complex
Carson City, Nevada 89710
Telephone: (702) 687-4170

APPENDICES

Jose M. Lozada
Name

N.D.O.P. #23574
Prison Number

Southern Desert Corr. Ctr. (SDCC)
Place of Confinement

RECEIVED
MAR 10 1989
RECEIVED AND FILED
OFFICE OF THE ATTORNEY GENERAL
MAR 8 8 50 AM '89
CLERK
BY VICKI SYZDEK DEPUTY

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

JOSE M. LOZADA (Full Name), Petitioner

vs.

GEORGE DEEDS, Respondent
(Name of Warden, Superintendent, jailor or authorized person having custody of petitioner.)

and

The Attorney General of the State of Nevada, BRIAN McKAY, Additional Respondent.

(NOTE: If petitioner is attacking a judgment which imposed a sentence to be served in the future, petitioner must fill in the name of the state where the judgment of conviction was entered.)

CV-S-89-173 LDG (RLH)
CASE NO. (To be supplied by the Clerk)

PETITION FOR A WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. §2254 BY A PERSON IN STATE CUSTODY

1) Name and location of the court which entered the judgment of conviction under attack: District Court, Clark County, Nevada, 200 South Third Street, Las Vegas, Nevada 89155.

2) Date judgment of conviction was entered: December 16, 1986.

3) Case number: C75275.

4) Length and terms of sentence: Ct. I, 5 yr., Ct. II, 15 yr. cs to Ct. I, Ct. III, 15 yr. and $50,000 cs to Ct. II, Ct. IV, 3 yr. cs to Cts. I & II with credit for time served in the amount of fifty-eight (58) days.

a) In a capital case where death penalty has been imposed, date of scheduled execution N/A

5) Are you presently serving a sentence imposed for a conviction other than the conviction under attack in this motion?

Yes ☐ No ☒XX

6) Nature of the offense involved: (all counts) **Ct. I - Conspiracy to ~~Sell Controlled Substance~~, Ct. II - Sale of Controlled Substance, Ct. III - Trafficking in Controlled Substance, Ct IV - Possession of Controlled Substances.**

7) What was your plea? (check one)

a) Not Guilty ☒XX b) Guilty ☐ c) Nolo Contendere ☐

8) If you entered a plea of guilty pursuant to a plea bargain, state the terms and conditions of the agreement: **[redacted] ~~There was "no"~~ plea bargain whatsoever in the instan[redacted] case.**

[redacted]

9) If you were found guilty after a plea of not guilty, was the finding made by: (check one)

a) A jury ☒XX b) A judge without a jury ☐

10) Did you testify at trial (if any)? Yes ☐ No ☒XX

11) Did you appeal from the judgment of conviction?

Yes ☐ No ☒XX

12) If you did appeal, state the name and location of the court where the appeal was filed, the result, the case number and the date of the court's decision (or attach a copy of the court's opinion or order): **N/A**

N/A

N/A

13) If you did not appeal, explain briefly why you did not: I knew nothing about the procedures and this was never explained to me by my retained attoney Mr. James Buchanan,Esq.. He knew before sentencing that I could not afford him for an Appeal and he said nothing to the court. Not even my desire to APPEAL.

a) Did you seek permission to file a late appeal?

Yes [ ] No [XX]

14) State concisely every ground on which you claim that you are being unlawfully held. Summarize briefly the facts supporting each ground. If necessary, you may attach up to two extra pages stating additional grounds or supporting facts. You should raise in this petition all available grounds for relief which relate to the conviction under attack.

CAUTION

Before proceeding in a federal court, you are required to exhaust the remedies available to you in the state courts as to each ground on which you request action by the federal court.

A)(1) Ground One: Petitioner Six Amendment right to "effective assistance of counsel " was violated,when Mr. Buchanan failed to advise Petitioner of his right to appeal, the producedure and time limits involved, and of his ritht to appointed cousel on appeal.

(2) Supporting Facts: (Without citing legal authority or argument state briefly the facts which support your claim.)

I was sentenced on December 16, 1986, and was thereafter placed in custody. Mr. Buchana had been my retained attorney since March, 1986 and remained with me until sentencing.

Mr. Buchanan was cognizant that I did not read, write, nor speak the English lanuage and during all of my court proceedings I had a court interpreter.

I had my sister visit Mr. Buchanan to discuss hiring his services again,since the jury had found me guilty. He told my sister that it would be cheaper to let the Clark County Public Defender's Office prosecute an appeal and that he had forward my legal file to their office. Irrespective of that, he did nothing to protect me...filing the notice of appeal, nor inform the court at sentencing of my financial status in order to insure "assistances of counsel" for my first appeal.

(3) Statement of Exhaustion of State Remedies as to Ground One:

Direct Appeal

(a) If you appealed from the judgment of conviction did you raise this issue? Yes /__/ No /XX/

(b) If you did not raise this issue in your direct appeal, explain briefly why you did not: **Mr. Buchanan did not advise me of my right to an anpeal in forma pauperis, thus I had no direct appeal.**

Post-Conviction Proceedings

(c) Did you raise this issue by means of a post-conviction motion or petition for habeas corpus in a state trial court? Yes /XX/ No /__/

(d) If your answer to (c) is "Yes", state the type of motion or petition, the name and location of the court where the motion or petition was filed, the result and date of the court's decision: **Petition for Writ of Habeas Corpus, District Court, Clark County, Nevada, which was denied on July 12, 1988.**

(e) Did you receive an evidentiary hearing on your motion or petition? Yes /__/ No /XX/

(f) Did you appeal from the denial of your motion or petition? Yes /XX/ No /__/

(g) If your answer to (f) is "Yes", state whether this issue was raised in the appeal, Yes /XX/ No /__/, and state the name and location of the court where the appeal was filed, the case number and the date of the court's decision (or attach a copy of the court's opinion or order): **Nevada Supreme Court, Carson City, Nevada, No. 19333, October 21, 1988.**

(h) If your answer to questions (e), (f) or (g) is "No", briefly explain: In reference to (e), on July 12, 1988, a hearing was held on the WRIT and the DA, myself, and the court interpreter appeared, that was the hearing.

Other Remedies

(i) Describe all other procedures (such as habeas corpus in the state supreme court, administrative remedies, etc.) you have used to exhaust your state remedies as to the issue: N/A

N/A

N/A

B)(1) Ground Two: Petitioner due process and equal protection of the law was violated, when the court did not find Mr. Buchanan's coodnet raised questions of "ineffective assistance of counsel" such that consideration of the first appeal on the jury trial be allowed.

(2) Supporting Facts: (Without citing legal authority or argument state briefly the facts which support your claim.)

Petitioner wish to incorporate Ground One supporting facts and all facts mentioned herein.

(3) Statement of Exhaustion of State Remedies as to Ground Two:

Direct Appeal

(a) If you appealed from the judgment of conviction did you raise this issue? Yes /___/ No /XX/

(b) If you did not raise this issue in your direct appeal, explain briefly why you did not: I have not had the benefit as an indigent to have a court appointed counsel for the purpose of my first appeal.

Post-Conviction Proceedings

(c) Did you raise this issue by means of a post-conviction motion or petition for habeas corpus in a state trial court? Yes /XX/ No /___/

(d) If your answer to (c) is "Yes", state the type of motion or petition, the name and location of the court where the motion or petition was filed, the result and date of the court's decision: Petition for Writ of Habeas Corpus, District Court, Clark County, Nevada, denied on July 12, 1988.

(e) Did you receive an evidentiary hearing on your motion or petition? Yes /___/ No /XX/

(f) Did you appeal from the denial of your motion or petition? Yes /XX/ No /___/

(g) If your answer to (f) is "Yes", state whether this issue was raised in the appeal, Yes /XXX/ No /___/, and state the name and location of the court where the appeal was filed, the case number and the date of the court's decision (or attach a copy of the court's opinion or order): Nevada Supreme Court, Carson City, Nevada, No. 19333, October 21, 1988.

(h) If your answer t questions (e), (f) or (g) is "No", briefly explain: In reference to (e), on July 12, 1988, a hearing was held on the WRIT and the DA, myself, and the court interpreter appeared, that was the hearing.

Other Remedies

(i) Describe all other procedures (such as habeas corpus in the state supreme court, administrative remedies, etc.) you have used to exhaust your state remedies as to the issue: N/A

N/A

N/A

C)(1) Ground Three: N/A

N/A

N/A

(2) Supporting Facts: (Without citing legal authority or argument state briefly the facts which support your claim.)

N/A

(3) Statement of Exhaustion of State Remedies as to Ground Three:

Direct Appeal

(a) If you appealed from the judgment of conviction did you raise this issue? ~~Yes~~ ~~No~~ /

(b) If you did not raise this issue in your direct appeal, explain briefly why you did not: N/A

N/A

N/A

Post-Conviction Proceedings

(c) Did you raise this issue by means of a post-conviction motion or petition for habeas corpus in a state trial court? ~~Yes~~ ~~No~~ /

(d) If your answer to (c) is "Yes", state the type of motion or petition, the name and location of the court where the motion or petition was filed, the result and date of the court's decision: N/A

N/A

N/A

(e) Did you receive an evidentiary hearing on your motion or petition? ~~Yes~~ ~~No~~ /

(f) Did you appeal from the denial of your motion or petition? ~~Yes~~ ~~No~~ /

(g) If your answer to (f) is "Yes", state whether this issue was raised in the appeal, ~~Yes~~ ~~No~~ /, and state the name and location of the court where the appeal was filed, the case number and the date of the court's decision (or attach a copy of the court's opinion or order): N/A

N/A

N/A

(h) If your answer to questions (e), (f) or (g) is "No", briefly explain: N/A

N/A

N/A

Other Remedies

(i) Describe all other procedures (such as habeas corpus in the state supreme court, administrative remedies, etc.) you have used to exhaust your state remedies as to the issue: N/A

N/A

N/A

15) Have all grounds for relief raised in this petition been presented to the highest state court having jurisdiction?

Yes /XX/ No /__/

16) If you answered "No" to question 15, state which grounds have not been so presented and briefly give your reason(s) for not presenting them: N/A

N/A

N/A

17) Have you previously filed any type of petition, application or motion in a federal court regarding the conviction under attack? Yes /__/ No /XX/. If "Yes", state the location of the court, the type of proceeding, the issues raised, the result and the date of the court's decision for each petition, application or motion filed: N/A

N/A

N/A

N/A

18) Do you have any petition, application, motion or appeal now pending in any court regarding the conviction under attack? Yes /___/ No /XX/. If "Yes", state the name of the court and the nature of the proceeding: N/A

N/A

N/A

19) Were you represented by an attorney at any time during the course of your arraignment and plea, trial (if any), sentencing, appeal (if any), or during the preparation, presentation or consideration of any petitions, motions or applications which you filed with respect to this conviction? Yes /XX/ No /___/. If "Yes", state the name(s) and address(es) of any such attorney(s), the proceedings in which you were so represented and whether said attorney(s) was/were of your own choosing or if appointed by the court: Mr. James Buchanan, Esq., 300 South Maryland Parkway, Las Vegas, Nevada 89101, was my retained attorney of record and I have not had another attorney for any reason.

Mr. Buchanan was my trial attorney!

Wherefore, petitioner prays that the court grant him such relief to which he may be entitled in this proceeding.

N/A
Signature of Attorney (if any)

N/A

N/A

N/A
(Attorney's full address and telephone number.)

Jose M. Lozada
Signature of Petitioner

Jose M. Lozada In Proper Person

DECLARATION UNDER PENALTY OF PERJURY

The undersigned declares under penalty of perjury that he is the petitioner in the above action, that he has read the above pleading and that the information contained therein is true and correct. 28 U.S.C. §1746. 18 U.S.C. §1621.

Executed at S.D.C.C., PoO. Box 208 (Location) Indian Springs, NV 89707 on January 19, 1989 (Date)

Jose M. Lozada
(Signature)

Jose M. Lozada #23574

CERTIFICATE OF SERVICE

The, Petitioner, Joseph M. Lozada, unde. the penalty of perjury, avows and swears that he has read the foregoing WRIT OF HABEAS CORPUS, and knows the contents to be true and correct except as to those matters stated on information and belief and as to those matters he believes them to be true; that he caused a copy of the above-mentioned motion to be mailed to the following address, by placing said motion in the U.S. Mail at S.D.C.C., directed and address to:

Bryan McKAY
Attorney General of Nevada
300 S. 3rd Street
Las Vegas, NV. 89101

DATED: this 19 day of January, 1989.

S/ Joe M. Lozada

Joseph M. Lozada #23574
Petitioner In Pro-Per
P.O. Box 208 - S.D.C.C.
Indian Springs, NV 89070

/ / /

/ / /

/ / /

/ / /

*****

Nevada Revised Statutes, sec. 177.315. Remedy: To whom available; conditions.

1. Any person convicted of a crime and under sentence of death or imprisonment in the state prison who claims that the conviction was obtained, or that the sentence was imposed in violation of the Constitution of the United States or the constitution of this state may, without paying a filing fee, apply for post-conviction relief from the conviction or sentence.

2. The remedy provided in this section is not a substitute for nor does it affect any remedies which are incident to the proceedings in the trial court, the remedy of direct review of the sentence or conviction or the writ of habeas corpus. It comprehends and takes the place of all other common law, statutory or other remedies which have heretofore been available for challenging the validity of the conviction or sentence, and must be used exclusively in place of them.

3. Unless there is good cause shown for delay, a proceeding under NRS 177.315 to 177.385, inclusive, must be filed within 1 year after entry of judgment of conviction or, if an appeal has been taken from such judgment, within 1 year after the final decision upon or pursuant to the appeal.

4. The execution of a sentence shall not be stayed for the period provided in subsection 3 simply because a petition for post-conviction relief may be filed within that period. A petition for post-conviction relief must actually be filed or the petitioner must show other reasons why a stay should be granted.

Nevada Revised Statutes, secs. 34.360,-.725, and -.730.

34.360 **Persons who may prosecute writ.** Every person unlawfully committed, detained, confined or restrained of his liberty, under any pretense whatever, may prosecute a writ of habeas corpus to inquire into the cause of such imprisonment or restraint.

34.725 **Petitioner required to file for post-conviction relief.** A petitioner may not file a petition for a writ of habeas corpus unless he previously filed a petition for post-conviction relief pursuant to NRS 177.315 to 177.385, inclusive, or demonstrates good cause for the failure to file a petition for post-conviction relief or meet the time requirements for filing a petition for post-conviction relief and actual prejudice to the petitioner.

34.730 **Petition: Verification; filing; title; service.**

1. A petition for a writ of habeas corpus requesting relief from a judgment of conviction or sentence in a criminal case must be verified by the petitioner or his counsel and filed with the clerk of the district court for the county in which the petitioner is in actual custody or with the clerk of the supreme court. If the petition is verified by counsel, the counsel shall also verify that the petitioner personally authorized him to commence the action. Before filing the petition, the clerk of a district court shall determine by the contents of the petition whether the petitioner is in actual custody in that judicial district.

2. The petition must be titled "Petition for Writ of Habeas Corpus (Post-Conviction)" and be in substantially the form set forth in NRS 34.735. The petition must name as respondent and be served by mail upon the officer or other person by whom the petitioner is confined or restrained. A copy of the petition must be served by mail upon the attorney general and the district attorney in the county in which the petitioner was convicted.

3. The clerk of the district court shall file a petition for a writ of habeas corpus as a new action separate and distinct from any original proceeding in which a conviction may have been had.

Rule 4(b) of the Nevada Rules of Appellate Procedure.

> Appeals in criminal cases. In a criminal case, the notice of appeal by a defendant shall be filed in the district court within thirty (30) days after the entry of the judgment or order appealed from. A notice of appeal filed after the announcement of a decision, sentence or order but before entry of the judgment or order shall be treated as filed after such entry and on the day thereof. If a timely motion in arrest of judgment or for a new trial on any ground other than newly discovered evidence has been made, an appeal from a judgment of conviction may be taken within thirty (30) days after the entry of an order denying the motion. A motion for a new trial based on the ground of newly discovered evidence will similarly extend the time for appeal from a judgment of conviction if the motion is made before or within thirty (30) days after the entry of the judgment. When an appeal by the state is authorized by statute, the notice of appeal shall be filed in the district court within thirty (30) days after the entry of the judgment or order appealed from. A judgment or other is entered within the meaning of this subdivision when it is signed by the judge and filed with the clerk.

APPENDIX

	PAGE NO.
PROVISION INVOKED (verbatim pages 1 thru 3)	3
EXHIBITS:	
3. Case No. C75275 - MINUTES-CRIMINAL	3
4. Clerk of the Supreme Court (notification of Record on Appeal)	4
5. Nevada Supreme Court Order dismissing Appeal	4
6. United States District Court, District of Nevada Order	4
7. United States District Court, District of Nevada Order denying certificate of probable cause	5
8. United States Court of Appeals for the Ninth Circuit denying certificate of probable cause	5

PROVISION INVOKED

CONSTITUTION OF THE UNITED STATES:

AMENDMENT VI - **Rights of accused in criminal prosecutions.** In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT V - **Prosecution by presentment, indictment; double jeopardy; self-incrimination; due process; property taken for public use.** No person shall be held to answer for a capital, or a otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV - Section 1. **Citizenship; privileges and immunities; due process; equal protection.** All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein the reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONSTITUTION OF THE STATE OF NEVADA:

Aritcle 1, Section 8. **Rights of accused in criminal prosecutions; jeopardy; due process of law; eminent domain.** No person shall be tried for a capital or other infamous crime (except in cases of impeachment, and in cased of the militia when in actual service and impeachment, and in cased of the militia when in actual service and the land naval forces in time of war, or which this state may keep, with the consent of congress, in time of peace, and in cases of petit larceny, under the regulation of the legislature) except on presentment or indictment of the grand jury, or upon information duly filed by a district attorney, or attorney-general of the state, and in any trial, in any court whatever, the party accused shall be allowed to appear and defend in persona, and with counsel, as in civil actions. No person shall be subject to be twice put in jeopardy for the same offense; nor shall he be compelled, in any

. . .

criminal case, to be a witness against himself, nor be deprived of life, liberty, or property, without just compensation having been first made, or secured, except in cases or war, riot, fire, or great public peril, in which case compensation shall be afterward made.

NEVADA RULES OF APPELLATE PROCEDURE:

Rule 4(b) - **Appeals in Criminal Cases.** In a criminal case, the notice of appeal by a defendant shall be filed in the district court within thirty (30) days after the entry of the judgment of order appealed from. A notice of appeal filed after the announcement of a decision, sentence or order but before entry of the judgment or order shall be treated as filed after such entry and on the day thereof. If a timely motion in arrest of judgment or for a new trial on any ground other then newly discovered evidence has been made, an appeal from a judgment of conviction may be taken within thirty (30) days after the entry of an order denying the motion. A motion for a new trial based on the ground of newly discovered evidence will similarly extent the time for appeal from a judgment of conviction if the motion is made before or within thirty (30) days statute, the notice of appeal shall be filed in the district court within thirty (30) days after the entry of the judgment of order appealed from. A judgment or order is entered within the meaning of this subdivision when it is signed by the judge and filed with the clerk.

NEVADA REVISED STATUTE (NRS):

NRS 171.188 - **Procedcure for appointment of attorney for indigent defendant.**

1. Any defendant charged with a public offense who is an indigent may, by oral statement to the district judge, justice of the peace, municipal judge or master, request the appointment of an attorney to represent him.

2. The request must be accompanied by the defendant's affidavit, which must state:

(a) That he is without means of employing an attorney; and

(b) Facts with some particularity, definiteness and certainty concerning his financial disability.

3. The district judge, justice of the peace, municipal judge or master shall forthwith consider the application and shall make such further inquiry as he considers necessary, If the district judge, justice of the peace, municipal judge or master:

(a) Finds that the defendant is without means of employing an attorney; and

(b) Otherwise determines that representation is required, the judge, justice or master shall designate the public defender of the county or the state public defender, as appropriate, to represent him. If the appropriate public defender is unable to represent him, or other good cause appears, another attorney must be appointed.

. . .

4. The county or state public defender must be reimbursed by the city for costs incurred in appearing in municipal court. The county shall reimburse the state public defender for costs incurred in appearing in justice's court. If a private attorney is appointed as provided in this section, he must be reimbursed by the county for appearance in justice's court or the city for appearance in municipal court in amount not to exceed $75 per case.

NRS 178.397 - **Assignment of counsel.** Every defendant accused of a gross misdemeanor or felony who is financially unable to obtain counsel is entitled to have counsel assigned to represent him at every stage of the proceedings from his initial appearance before a magistrate of the court through appeal, unless he waives such appointment.

NRS 260.060 - Magistrate or district court may, on its own motion or upon motion of the public defender or the indigent person, appoint and compensate out of county funds an attorney other than, or in addition to, the public defender to represent such indigent person at any stage of the proceedings or an appeal in accordance with the laws of this state pertaining to the appointment of counsel to represent indigent criminal defendants.

/ / / / / / / / / /

/ / / / / / / / / /

/ / / / / / / / / /

SUPREME COURT OF THE UNITED STATES

JOSE M. LOZADA *v.* GEORGE DEEDS, WARDEN

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 90-5393. Decided February 19, 1991

PER CURIAM.

Petitioner Jose M. Lozada was convicted in Nevada state court in 1987 of four crimes arising out of the possession and sale of a controlled substance in violation of the laws of that State. Lozada filed no direct appeal. After exhausting state postconviction remedies, he filed a petition for a writ of habeas corpus in the United States District Court for the District of Nevada. Lozada contended that ineffective assistance of counsel had deprived him of the opportunity to appeal his state-court convictions. In particular, he alleged his attorney failed to inform him of his right to appeal, of the procedures and time limitations for an appeal, and of his right to appointed counsel. The habeas petition alleged further that the attorney had failed to file a notice of appeal or to insure that Lozada received appointed counsel on appeal. It also implied that Lozada had been misled when the attorney told Lozada's sister that his case had been forwarded to the public defender's office.

Without holding a hearing on Lozada's claims, a federal magistrate recommended that the petition be dismissed. The District Court agreed and dismissed the petition, rejecting the ineffective assistance claim on the ground that petitioner's allegations failed to satisfy the standard set forth in our decision in *Strickland* v. *Washington*, 466 U. S. 668 (1984). The court acknowledged that trial counsel's alleged failure to inform petitioner of his right to appeal might constitute conduct below constitutional standards. It reasoned, however, that Lozada had not indicated what issues he would have raised on appeal and had not demonstrated that the ap-

peal might have succeeded. As a result, the court concluded that petitioner had not shown prejudice under the *Strickland* test. The District Court later denied Lozada a certificate of probable cause to appeal the denial of habeas relief, see 28 U. S. C. § 2253, again stating that Lozada had failed to show any prejudice from counsel's alleged errors. The United States Court of Appeals for the Ninth Circuit also denied a certificate of probable cause in a one-sentence order. Lozada filed the instant petition for a writ of certiorari, which we now grant along with his motion for leave to proceed *in forma pauperis*.

In *Barefoot* v. *Estelle*, 463 U. S. 880, 892–893 (1983), we delineated the standards for issuance of a certificate of probable cause. We agreed with the courts of appeals that had ruled that "a certificate of probable cause requires petitioner to make a 'substantial showing of the denial of [a] federal right.'" *Id.*, at 893 (quoting *Stewart* v. *Beto*, 454 F. 2d 268, 270, n. 2 (CA5 1971), cert. denied, 406 U. S. 925 (1972)). We also quoted with approval *Gordon* v. *Willis*, 516 F. Supp. 911, 913 (ND Ga. 1980) (citing *United States ex rel. Jones* v. *Richmond*, 245 F. 2d 234 (CA2), cert. denied, 355 U. S. 846 (1957)), which explained that in order to make a substantial showing of the denial of a federal right a petitioner who has been denied relief in a district court "'must demonstrate that the issues are debatable among jurists of reason; that a court *could* resolve the issues [in a different manner]; or that the questions are "adequate to deserve encouragement to proceed further."'" 463 U. S., at 893, n. 4.

We conclude that the Court of Appeals erred in denying Lozada a certificate of probable cause because under the standards set forth in *Barefoot* Lozada made a substantial showing that he was denied the right to effective assistance of counsel. The District Court rested its analysis on the prejudice prong of the *Strickland* inquiry and that was presumably the basis for the Court of Appeals' decision to deny a certificate of probable cause. We believe the issue of preju-

dice caused by the alleged denial of the right to appeal could be resolved in a different manner than the one followed by the District Court. Since *Strickland*, at least two Courts of Appeals have presumed prejudice in this situation. See *Abels* v. *Kaiser*, 913 F. 2d 821, 823 (CA10 1990); *Estes* v. *United States*, 883 F. 2d 645, 649 (CA8 1989); see also *Rodriquez* v. *United States*, 395 U. S. 327, 330 (1969). The order of the Court of Appeals did not cite or analyze this line of authority as reflected in *Estes*, which had been decided before the Ninth Circuit issued its ruling.

The judgment is reversed and the case remanded for further proceedings consistent with this opinion.

It is so ordered.

THE CHIEF JUSTICE and JUSTICE O'CONNOR would deny the petition for a writ of certiorari.